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No. 83-510

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1983

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LOCAL UNION 1702, UNITED MINE WORKERS OF AMERICA,
*Petitioner,*

v.

CONSOLIDATION COAL COMPANY,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

Respondent, Consolidation Coal Company, does not agree with the petitioner's statement of the questions presented. Properly, the questions presented are as follows:

1. Whether a local union may be held liable in damages for breaching a collective bargaining agreement, under the so-called "mass action" theory of liability, when all of the local's members, officers and committeemen participated in a wildcat strike?

2. Whether a local union may be held liable in damages for breaching a collective bargaining agreement, under the so-called "common-law agency" theory of liability, when the efforts of the local union to bring a wildcat strike to an end were so minimal as to be foreseeably ineffective?

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF FOR RESPONDENT IN OPPOSITION

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The respondent, Consolidation Coal Company,[1] submits that the petition of Local Union 1702, United Mine Workers of America,[2] for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case should be denied. Consol concurs with Local 1702's discussion of the *Opinions Below*, *Jurisdiction*, and *Statute Involved*.

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[1] Respondent, Consolidation Coal Company, will henceforth be referred to as "Consol."

[2] Petitioner, Local Union 1702, United Mine Workers of America, will henceforth be referred to as "Local 1702."

## I.

## COUNTERSTATEMENT OF THE CASE

### A. General Background.

Consol is engaged in the business of producing, processing and shipping bituminous coal from mines which it operates in various states, including the Blacksville No. 2 Mine in Monongalia County, West Virginia [App. 8-9, 27, 38].[3] At all times relevant hereto, Consol employed approximately 400 production and maintenance employees at Blacksville No. 2 Mine, all of whom were members of, and represented for collective bargaining purposes by, Local 1702 [App. 38-39, 75-76, 81-82, 96-98, 152-53].

Consol and Local 1702 were parties to the National Bituminous Coal Wage Agreement of 1978 [App. 39, 150-51, 234]. Article XXIII of the contract provided for the mandatory peaceful settlement of all disputes, including disputes over discharging employees [App. 39, 238-42]; Article XXIV set forth a specific procedure whereby Consol could discharge employees [App. 39, 242-44]; and Article XXVII specified that the integrity of the contract would be maintained [App. 39, 41, 244-45].[4]

### B. Unauthorized Work Stoppage.

At approximately 6:00 a.m. on Thursday, January 29, 1981, a Consol foreman observed an employee on the

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[3] Citations to the Appendix herein refer to the Joint Appendix prepared for purposes of the appeal in the United States Court of Appeals for the Fourth Circuit. Pursuant to Rule 19.1 of the Rules of the United States Supreme Court, Consol requested the Clerk of the Fourth Circuit to certify and transmit the Joint Appendix to this Court.

[4] The language in Article XXVII has been given the same effect as an explicit "no-strike" clause. *See Gateway Coal Co. v. UMWA*, 414 U.S. 368 (1974).

Blacksville No. 2 Mine midnight shift named John Anderson in the process of stealing company property from the mine. Consol promptly suspended employee Anderson, simultaneously expressing its intent to discharge him in accordance with the contract procedures set forth in Article XXIV [App. 39-40, 84-85, 102, 129, 153-54, 173, 185, 238-42].

Despite the availability of grievance and arbitration procedures, and notwithstanding the employees' contractual agreement not to strike over issues cognizable under the grievance procedure, commencing at 12:01 a.m. on Friday, January 30th, the midnight shift at Blacksville No. 2 Mine embarked upon a "wildcat" strike over Anderson's discharge [App. 40, 58-59, 70, 86-87, 119, 130, 132-33, 141, 143, 155, 173-74]. Shortly after commencement of the strike, Consol sent a telegram to Local 1702 President Freddie W. Kelley demanding that he immediately require Local 1702 members to terminate their illegal strike activity [App. 40, 317]. Nevertheless, the work stoppage continued without interruption on all work shifts until 12:01 a.m., Wednesday, February 4th [App. 40-41, 59-60, 63, 64-65, 88]. Participating in the work stoppage were all officers, mine committeemen and members of Local 1702 [App. 58-59, 61-63].

It is undisputed that the wildcat strike was to protest the discharge of employee Anderson. It is also undisputed that the underlying issue giving rise to the strike was a dispute clearly subject to the contractual grievance and arbitration procedures [App. 41, 86-87].

Between 12:01 a.m. on Friday, January 30th and 12:01 a.m. on Wednesday, February 4th, Consol had scheduled nine production shifts of work [App. 59-63, 82, 87-88]. Additionally, Consol had scheduled certain members of Local 1702 to perform maintenance work on Saturday, January 31st [App. 40-41, 89]. Therefore, work was available to the officers, mine committeemen and members of Local 1702 throughout the period of the strike [App.

63, 88-89]. Moreover, Consol had a constant market for the coal which would have been produced during the period of the strike [App. 41, 83, 94].

**C. Issuance And Violation Of Temporary Restraining Order; Assessment Of Fine.**

On January 30th, 1981, Consol filed a complaint in the United States District Court for the Northern District of West Virginia against Local 1702, as well as its officers and mine committeemen, seeking a *Boys' Markets* temporary restraining order to enjoin the illegal strike and directing all officers and members of Local 1702 to return to work. That same afternoon, the District Court issued a temporary restraining order applicable to Local 1702 and its officers, committeemen and members, ordering them to cease their illegal work stoppage and to return to work [App. 89, 104].

Notice was promptly given of the requirements of the temporary restraining order. All officers and committeemen of Local 1702 were served with the order on Saturday, January 31st [App. 89-90, 121, 132, 144, 155-56]; certified copies of the order were posted on January 31st at conspicuous locations at Blacksville No. 2 Mine [App. 89-90]; and the requirements of the temporary restraining order were widely publicized by Consol in the north central West Virginia geographic area by radio and television on January 30th, January 31st, and February 1st [App. 94].

When the Local and its officers, committeemen and members all failed to obey the temporary restraining order, the District Court held them in civil contempt and assessed certain fines [App. 104]. Although some of the fines were remitted, others were reduced to judgment, and the United States Court of Appeals for the Fourth Circuit eventually upheld the civil contempt determination and fine assessments of the District Court. *See Consolidation Coal Co. v. Local 1702, UMWA*, 683 F.2d 827 (4th Cir. 1982).

**D. Denial Of Compensatory Damages For Breach Of Contract In District Court Action.**

In addition to a temporary restraining order, in its complaint filed on January 30th, pursuant to § 301 of the Labor-Management Relations Act,[5] Consol sought compensatory damages for its losses sustained as a result of the unlawful strike.[6] On October 30th, a non-jury trial was held before the Honorable William M. Kidd, Judge of the United States District Court for the Northern District of West Virginia.

In addition to the facts previously mentioned herein, the trial record undisputably shows that Local 1702, by virtue of its own Bylaws and the UMWA International Constitution, was obligated to use its authority and available means and methods to require its members to refrain from and to terminate unauthorized work stoppages. Specifically, officials of Local 1702 had the following self-imposed obligations: (1) not to encourage or *participate* in "wildcat" strikes [App. 260-61, 289]; (2) to "exert *every* reasonable effort available to discourage and prevent unauthorized stoppages or walkouts"; (3) to "take *all* measures necessary to terminate *immediately* all such stoppages and walkouts" [App. 278, 281, 314 (emphasis added)]; and, (4) to schedule a meeting "as soon as possible" after the work stoppage occurred [App. 254, 284, 315]. Additionally, the officials of Local 1702 had it within their means and power to charge formally those members and officers who violated their respective obligations under the collective bargaining agreement; to subject the violators to a trial before their UMWA peers; and, if found guilty, to reprimand or fine each of them up to $200.00 [App. 261-64, 284-87, 311-12]. Finally, the officials of Local 1702 could have sought help from

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[5] 29 U.S.C. § 185.

[6] Although Consol filed this § 301 action against not only Local 1702, but also its officers and committeemen, Consol pursued the damage claim against the Local alone.

the International UMWA President or the International UMWA Executive Board.

The record is clear that Local 1702, and its officers and committeemen, failed to resort to the foregoing means and methods in order to exert authority and control over the membership of Local 1702 and end the strike. On the contrary, the record demonstrates that at no time during the strike did the officers and committeemen go to work, or sincerely attempt to go to work, in order to serve as examples for the other employee members of Local 1702 [App 91-92, 94, 117, 120-21, 131-32, 134-35, 145, 156-57, 188-90]; at no time did any representative of Local 1702 arrange for "back to work" television or radio broadcasts, or newspaper advertisements instructing the members of Local 1702 to comply with the terms of the contract;[7] and at no time did Local 1702 send any telegram or written communication to, or telephone, the members of Local 1702 urging them to return to work [App. 42, 125-26, 144-45, 162-65]. Although Local 1702 called a "special meeting" for Sunday, February 1st, that meeting was not called "as soon as possible" after commencement of the strike at 12:01 a.m. on Friday, January 30th. Furthermore, at no time during the union meeting did Local officers or committeemen make or encourage a return-to-work motion or suggest a vote on the question of whether to return to work [App. 143, 166-68].

The record shows that after the strike began, Local 1702 officials were, to a certain extent, involved in the processing of the Anderson grievance. During the same

[7] Although Local 1702 initially did not arrange for "back to work" announcements, Local 1702 President Freddie Kelley did arrange for radio broadcasts to announce the special meeting called for Sunday, February 1st [App. 42, 161-62, 188-89]. Then, after being held in contempt on February 3rd, and meeting with United States District Court Judge Charles H. Haden, II on the same date, Kelley finally arranged for broadcasts telling the men to go back to work [App. 162-63].

period of time, their only "efforts" to end the strike consisted of two types of activities. First, the one or two Local officials who were scheduled to work a particular shift showed up at the bathhouse or the parking lot prior to the commencement of that shift and supposedly gave verbal directives to the members present to return to work [App. 48, 90-91, 107-09, 111, 114-15, 116-17, 119-20, 134-36, 192-93, 204-05, 208-09, 214-15, 218-19]. Second, at the meeting on Sunday, February 1st, the officials supposedly gave more verbal directives to the members to return to work [App. 42, 159, 167-68, 178-80, 189].

Finally, a review of the record reveals that at the conclusion of the civil contempt hearing late in the afternoon on Tuesday, February 3rd, Judge Haden met with Local 1702 President Kelley and Mine Committeeman Richard Roberts and urged them to put on their work clothes and lead the men back into the mines [App. 186]. Significantly, when Kelley and Roberts complied with Judge Haden's instructions, and when the union finally broadcast the "back to work orders," the work stoppage promptly ended, with production resuming at 12:01 a.m. on Wednesday, February 4th [App. 64-65].

At trial, Consol relied upon two well-recognized legal theories of local union contractual liability, namely, the "mass action" theory and the common-law agency theory. The District Court, however, refused to give any consideration to the mass action theory, interpreting the opinion of this Court in *Carbon Fuel Co. v. UMWA*, 444 U.S. 212 (1979), as a *complete* repudiation of that theory [App. 37]. In refusing to apply the mass action theory to the essentially undisputed facts of this case, the District Court seized upon the following language of this Court's *Carbon Fuel* decision: "Congress limited the responsibility of unions for strikes in breach of contract to cases when the union may be found responsible according to the common-law rule of agency." 444 U.S. at 216.

Moreover, the District Court held that Local 1702 was not liable for breach of contract under the common-law agency theory. After reciting the means and methods Local 1702 had at its disposal, but did not utilize, to attempt to persuade its membership to return to work, the District Court opined that the Local's efforts were

> hampered somewhat by the involvement of the officers and committeemen in the 24-48 hour meeting on January 30, 1981, the investigation and the preparation of the Anderson grievance, the arbitration initially scheduled for February 3, 1981 and actually conducted on February 4, 1981, the contempt hearing conducted before Judge Haden on February 3, 1981, and the short duration of the actual stoppage.

[App. 42].

**E. Reversal By The Fourth Circuit; Holding Of Local Union Liability Based Upon Application Of Both The Mass Action Theory And The Common-Law Agency Theory.**

On appeal, the United States Court of Appeals for the Fourth Circuit found that the District Court had misconstrued this Court's *Carbon Fuel* decision and held that the mass action principle was fully applicable to the case at bar. *See Consolidation Coal Co. v. Local 1702, UMWA*, 709 F.2d 882, 885 (4th Cir. 1983). The Fourth Circuit pointed out that only district and international, and not local, union liability was at issue before this Court in *Carbon Fuel*. Therefore, *Carbon Fuel* did not preclude local union liability. 709 F.2d at 885.

Furthermore, after reviewing the undisputed operative facts, the Fourth Circuit ruled "clearly erroneous" the District Court's determination that Local 1702 was not liable for breaching the collective bargaining agreement under the so-called "common-law agency" theory. 709 F.2d at 886. Contrasting the "meager efforts" of Local 1702 to end the strike with the Local's unused, but avail-

able, means to persuade its members to return to work, the Fourth Circuit found that the union's "efforts" to end the strike were "foreseeably ineffective." And, based upon "the lack of efforts by Local 1702 to return its members to work," the Court concluded that "the local union ratified and encouraged the strike and is, accordingly, liable under common-law agency theory for damages caused . . . by the illegal work stoppage." *Id.* at 886.

## II.

## REASONS FOR DENYING THE WRIT

### A. Although The Fourth Circuit Is In Conflict With The Sixth Circuit With Respect To The Applicability Of The Mass Action Theory, The Fourth Circuit Is In Complete Accord With This Court's *Carbon Fuel* Decision As Well As The Decisions Of The Other Circuits Which Have Decided The Mass Action Issue.

#### 1. *Historically, The Mass Action Theory Has Been Applied Correctly Only To The Entity Whose Members Act En Masse.*

The concept of union responsibility for the mass action of its members was first espoused in *United States v. International Union, UMWA*, 77 F. Supp. 563 (D.D.C. 1948), *cert. denied*, 338 U.S. 871 (1949). In that case, the members of the UMWA staged a nationwide "walkout" of coal mines. Subsequently, the district court issued a temporary restraining order directing that the status quo be resumed and that the miners return to work. When the miners refused, thereby violating the terms of the temporary restraining order, the court held the national union in contempt. In response to arguments propounded by the union that rank-and-file miners left the mine of their own volition and without instructions from the union, the court stated:

> If a nod or a wink code was used in place of the word "strike," there was just as much a strike called as if the word "strike" had been used.
>
> . . . .
>
> The Court thinks that the principle is this: *that as long as a union is functioning as a union it must be held responsible for the mass action of its members.* It is perfectly obvious not only in objective reasoning but because of experience that men don't act collectively without leadership. The idea of suggesting that from 350,000 to 450,000 men would all get the same idea at once, independently of leadership, and walk out of the mines, is of course simply ridiculous.

*Id.* at 566 (emphasis added).

Often cited as a leading case supporting the mass action theory of union liability is *Eazor Express, Inc. v. International Brotherhood of Teamsters*, 520 F.2d 951 (3d Cir. 1975), *cert. denied*, 424 U.S. 935, *reh'g denied*, 425 U.S. 908 (1976). In *Eazor*, after the members of the two local unions engaged in a wildcat strike, a § 301 breach of contract damage action was filed against both locals and the international. Drawing upon reasoning similar to that utilized by the court in *United States v. International Union, UMWA*, 77 F. Supp. 563, the *Eazor* court applied mass action as one theory of liability and held the Teamster locals as well as the international liable in damages for the employer's losses resulting from the strike.

One year later, in *United States Steel Corp. v. UMWA*, 534 F.2d 1063 (3d Cir. 1976), the Third Circuit circumscribed the rule of *Eazor Express* by holding—quite logically—that union liability under the mass action theory must be "limited to the entity whose membership acts in concert." Therefore, without a showing of "complicity" on the part of the district or international, the local is

the *only* union entity that could be held liable under the mass action theory. 534 F.2d at 1074.

Prior to this Court's *Carbon Fuel* decision, the Fourth Circuit also limited liability for "wildcat" strikes to the local union. In *United Construction Workers v. Haislip Baking Co.*, 223 F.2d 872 (4th Cir.), *cert. denied*, 350 U.S. 847 (1955), the court was confronted with a § 301 action against two national unions for an illegal work stoppage by the employees of a bakery. In distinguishing between the liability of the local and international unions, the Fourth Circuit stated:

> The local union was liable because the strike, although informally commenced, unquestionably had the approval of the local union; but this was not true of the [national unions].
>
> . . . We have never held, however, that there is any responsibility on the part of a union for a strike with which it has had nothing to do; and there manifestly is no such liability.

*Id.* at 877.

Similarly, better-reasoned cases on mass action decided before *Carbon Fuel* follow the wisdom of the Third Circuit in *United States Steel Corp.*, 534 F.2d 1063, and the Fourth Circuit in *Haislip*, 223 F.2d 872, by limiting union liability for the mass action of its members, absent "complicity" on the part of the larger union entity, to the local. *See, e.g., United States Steel Corp. v. UMWA, District 20*, 598 F.2d 363 (5th Cir.), *reh'g denied*, 605 F.2d 555 (5th Cir. 1979); *Black Diamond Coal Mining Co. v. Local Union No. 8460, UMWA*, 597 F.2d 494 (5th Cir. 1979); *Turnkey Constructors, Inc. v. Cement Masons Local Union No. 685*, 580 F.2d 798 (5th Cir. 1978); *Molded Materials Co. v. International Union of Electrical, Radio & Machine Workers*, 418 F. Supp. 548 (W.D. Pa. 1976). *Cf. California Trucking Association v. Brotherhood of Teamsters, Local No. 70*, 679 F.2d 1275 (9th

Cir. 1981), *cert. denied*, —— U.S. ——, 74 L. Ed. 2d 281, 103 S. Ct. 299 (1982); and *Danielson v. United Seafood Workers Smoked Fish & Cannery Union, Local 359*, 405 F. Supp. 396 (S.D.N.Y. 1975).[8]

**2. *The Decision Below Is Not In Conflict With This Court's* Carbon Fuel *Decision Because This Court, In* Carbon Fuel, *Did Not Vitiate Or Even Address The Mass Action Theory Of Liability With Respect To Local Unions.***

In *Carbon Fuel Co. v. UMWA*, 444 U.S. 212 (1979), this Court made it clear that, in the absence of a contractual "best efforts" clause, neither an *international* nor a *district* UMWA union (vis-a-vis the local union) can be held liable for damages in a § 301 suit unless the employer can prove instigation, support, ratification or encouragement of a strike. If, as Local 1702 argues, this Court intended its *Carbon Fuel* decision to end altogether the use of the mass action theory—a well-recognized and widely-applied basis for local union liability for over 30 years—why did the Court not manifest such intent in unequivocal and unmistakable language. On the contrary, this Court did not even discuss the concept of mass action as it applies to local unions, although certain language in the opinion suggests clearly that the mass action theory of local union liability remains viable.

*Carbon Fuel* involved a § 301 suit initiated in district court against the international, the district and three local UMWA unions. Damages were sought as a result of numerous work stoppages which had occurred at various employer mines during a five-year span. The trial court found as a matter of law that the strikes violated

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[8] As discussed, *infra*, in the historical development of the mass action theory, only the Sixth Circuit declined to adopt mass action as a theory of local union liability. *See Peabody Coal Co. v. Local Unions 1734, 1508, 1548 & District No. 23, UMWA*, 543 F.2d 10 (6th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).

the labor agreement, and a jury returned verdicts in different amounts against the locals as well as the international and district unions.

On appeal, consistent with its earlier decision in *United Construction Workers v. Haislip Baking Co.*, 223 F.2d 872, and the Third Circuit's ruling in *United States Steel Corp. v. UMWA*, 534 F.2d 1063, the Fourth Circuit vacated the judgments against the international and district unions. The Fourth Circuit, however, affirmed the judgments against the local unions, stating that "responsibility for wildcat strikes under this theory [mass action] ordinarily will be limited to the local union." *Carbon Fuel Co. v. UMWA*, 582 F.2d 1346, 1349 (4th Cir. 1978).

This Court subsequently granted Carbon Fuel Company's petition for a writ of certiorari to review the Fourth Circuit's refusal to enforce the judgments obtained against the international and district unions. Significantly, however, the local unions, against which judgments were upheld on the mass action theory of contractual liability, did not seek review of the Fourth Circuit's holding that the mass action theory may properly be applied to them. Thus, as Local 1702 correctly recognized in its petition (p. 6, n.3), this Court in *Carbon Fuel* was not presented with, and did not address, the question of whether mass action is a proper theory of liability when applied to local unions.

In the case *sub judice*, both the District Court and Local 1702 seized upon the following *Carbon Fuel* language to support their view that this Court implicitly rejected the application of the mass action theory to local unions:

> Insofar as petitioner's argument relies on the history of § 301 and the congressional plan to prevent and remedy strikes in breach of contract by encouraging arbitration, the legislative history is clear that Congress limited the *responsibility of unions* for

> strikes in breach of contract to cases when the union may be found responsible according to the common-law rule of agency.

444 U.S. at 216 (emphasis added). Thus, both the District Court and Local 1702 interpret the "responsibility of unions" language to be broad enough to encompass local unions.

By reading this Court's opinion in *Carbon Fuel* in conjunction with the previous case law, however, it becomes clear that the District Court's interpretation of the *Carbon Fuel* opinion was incorrect. Mass action was *not* the issue in *Carbon Fuel.* Instead, this Court decided a "reasonable efforts to end' issue which related only to international and district union liability, stating, "[r]eview of the judgments against the locals [which were based upon mass action] was not sought here." 444 U.S. at 215, n.3.

Second, and more importantly, language in the *Carbon Fuel* opinion suggests approval of the traditional view that local unions may be contractually liable under the mass action theory. On page 215 of its opinion, this Court quoted with approval the following language from the Fourth Circuit's *Haislip* decision:

> We have never held . . . that there is any responsibility on the part of a union for a strike with which it had nothing to do . . . .

*United Construction Workers v. Haislip Baking Co.*, 223 F.2d at 877. Implicit, of course, is the notion that when a union has something to do with a strike, there may be responsibility.

Similarly, in the *Carbon Fuel* footnote explaining the language relied upon by the District Court herein to reject mass action as a viable legal theory, this Court stated:

> [W]e are addressing the . . . issue of whether an *international or district* union may be held legally

> responsible for *locals' unilateral* actions which are *concededly in violation of the locals' responsibilities* under the contract.

444 U.S. at 216, n.5 (emphasis added). It is important to recognize that the contractual violation and liability of the locals in *Carbon Fuel*, treated as a matter of concession by this Court, were predicated upon application of the mass action theory. This Court did not abrogate the longstanding policy of holding local unions liable for breach of a collective bargaining agreement under the mass action theory. On the contrary, *Carbon Fuel*, properly read, contains support for continued application of the mass action doctrine.

### 3. *Only The Sixth Circuit Is In Conflict With The Fourth Circuit With Respect To The Applicability Of The Mass Action Theory To Local Unions.*

As previously mentioned, during the historical development of the "mass action" concept, only the Sixth Circuit has declined to apply that theory of liability to local unions. *Peabody Coal Co. v. Local Unions 1734, 1508, 1548 & District No. 23, UMWA*, 543 F.2d 10; *Davis Co. v. United Furniture Workers of America*, 674 F.2d 557 (6th Cir.), *cert. denied*, —— U.S. ——, 74 L. Ed. 2d 279, 103 S. Ct. 296 (1982). Consequently, only the Sixth Circuit is in conflict with the decision below. Reliance by Local 1702 on the cases it cites in support of its argument that the Fourth Circuit is in conflict with the Eleventh, Third and Fifth Circuits is misplaced.

First, in *North River Energy Corp. v. UMWA*, 664 F.2d 1184 (11th Cir. 1981), the employer was a signatory to the National Bituminous Coal Wage Agreement of 1978 and operated an underground mine at which Local 1926 of the UMWA represented approximately 450 miners. After a series of illegal work stoppages over grievable issues, the employer brought a

§ 301 action against the local union. Although failing to apply mass action under the facts of that case, the Eleventh Circuit clearly recognized it as a viable theory of law, correctly stating that liability under the mass action theory "is limited to the entity whose membership acts in concert, usually the local union." *Id.* at 1193-94. *See also Alabama By-Products Corp. v. Local No. 1881, UMWA*, 690 F.2d 831 (11th Cir. 1982), wherein the Eleventh Circuit applied the mass action theory.

Next, Local 1702 speculates that because the Third Circuit affirmed, without opinion, the District Court's decision in *Airco Speer Carbon-Graphite v. Local 502, International Union of Electrical, Radio & Machine Workers of America*, 494 F. Supp. 872 (W.D. Pa. 1980), *aff'd*, 649 F.2d 858 (3d Cir. 1981), it adopted the statement of the district court therein that "the mass action theory [did] not survive *Carbon Fuel.*" 494 F. Supp. at 876. Despite that statement, however, the district court had held the local union liable under the "common-law agency" theory for ratifying the illegal strike. As previously discussed herein, the Third Circuit had historically and repeatedly applied the mass action theory to local unions. In view of that precedent, it only stands to reason that the Third Circuit would not abrogate the oft-applied and longstanding mass action theory of local union liability without even providing an opinion. Indeed, it is more likely that the Third Circuit was merely affirming the District Court's finding of local union liability under the "common-law agency" theory.

Finally, Local 1702 has taken out of context the language it quotes from the Fifth Circuit's decision in *United States Steel Corp. v. UMWA*, 519 F.2d 1249 (5th Cir. 1975), *reh'g denied*, 526 F.2d 377 (5th Cir. 1976). Indeed, in that case the Fifth Circuit quoted with approval its statement and application of the mass action principle in *Vulcan Materials Co. v. United Steel-*

*workers of America*, 430 F.2d 446, 456 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971). Moreover, Local 1702 also seems to have ignored *United States Steel Corp. v. UMWA*, 598 F.2d 363 and *Turnkey Constructors, Inc. v. Cement Masons Local Union No. 685*, 580 F.2d 798, wherein the Fifth Circuit found mass action to be a viable theory of local union liability.[9]

**B. Mass Action Aside, Because The Decision Below Is Not In Conflict With Holdings Of This Court, Or Other Circuit Courts, With Respect To Application Of The Common-Law Agency Theory Of Local Union Liability, This Court Should Affirm The Decision Below Based Upon Operative Facts Which Compel A Finding Of Local Union Ratification Of The Strike.**

As previously discussed, an alternate theory of local union liability for unauthorized work stoppages is the so-called "common-law agency" theory whereunder "liability is dependent upon a showing that the union in some way made itself a party to the illegal strike" by way of encouragement, support or ratification thereof. *North River Energy Corp. v. UMWA*, 664 F.2d at 1192. Moreover, in order for local officials to encourage, support or ratify an illegal strike on behalf of the local union, they need not perform any affirmative action of ratification or support. "Ratification occurs where the union's efforts to return strikers are so minimal that the union's approval or encouragement may be inferred." *United States Steel Corp. v. UMWA, District 20*, 598 F.2d at 365.

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[9] For other cases decided in the wake of *Carbon Fuel* which approve the continuing viability of the mass action theory as it applies to local unions, *see, e.g., Dresser Industries, Inc. v. United Steelworkers of America, Local 4601*, 110 L.R.R.M. 2661 (W.D.N.Y. 1981); *Keebler Co. v. Local 492-A, Bakery, Confectionary & Tobacco Workers International Union*, 104 L.R.R.M. 2625 (E.D. Pa. 1980); *Consolidation Coal Co. v. International Union, UMWA*, 500 F. Supp. 72 (D. Utah 1980).

In the case at bar, the Fourth Circuit relied upon undisputed facts adduced at trial in holding that the district "court's finding of a lack of ratification and encouragement by the local union is clearly erroneous." *Consolidation Coal Co. v. Local 1702, UMWA*, 709 F.2d at 886. The Fourth Circuit recognized that although the UMWA Constitution and the Local 1702 Bylaws imposed certain duties upon the Local officials to end the strike,[10] no official of Local 1702 made any effort to use radio, television or other news medium to publicly urge the Local membership to end the strike. Likewise, no official of Local 1702 ever threatened the use of internal union discipline against members who failed to return to work, despite the fact that the UMWA Constitution and Local Bylaws bestowed that power upon the Local officials; no official of Local 1702 ever dressed for work and went into the mine in an attempt to lead the rank-and-file miners back to work; no Local official ever wrote to the members or mailed any communication indicating that the strike should end; no Local official ever made any effort to telephone the members individually to urge them to return to work. *Id.* at 886.

The Fourth Circuit contrasted that "long list" of activities which the Local could have taken with the two "meager" efforts which Local officials supposedly made to "attempt" to end the strike. The sum and substance of these "efforts" consisted of oral "instructions" or "encouragement" to the miners to return to work. The "in-

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[10] The Fourth Circuit acknowledged that the UMWA Constitution and the Bylaws of Local 1702 imposed duties on Local officials which, *inter alia*, were to enforce the contract, to take all measures necessary to end all unauthorized work stoppages, not to support or participate in any strike unsanctioned by the International, and to subject those members who violate their contractual obligations to trial and punishment. *Id.* at 886.

structions" or "encouragement" took place in the privacy of the miners' bathhouse prior to the beginning of each shift and behind the closed doors of the meeting hall where the special union meeting called for February 1st was held. No disinterested person knows exactly what was said to the Local members in these directives, the tone of the communication, or, indeed, whether they were made with an accompanying and guiding "nod" or "wink." Based upon those facts, the Fourth Circuit held that the "efforts made by union officials to end the strike were 'foreseeably ineffective,' " and that their lack of effort amounted to ratification of the illegal activity. *Id.* at 886 (citation omitted).

In its petition, Local 1702 improperly attempts to equate the Fourth Circuit's finding of ratification to the now defunct theory that a local union could be held liable for breach of contract under common-law agency principles for failing to use its "best efforts" or "all reasonable means" to end a strike.[11] In this fashion, Local 1702 attempts to place the decision below in conflict with this Court's *Carbon Fuel* decision, the decisions of the Sixth Circuit in *Southern Ohio Coal Co. v. UMWA*, 551 F.2d 695, *cert. denied*, 434 U.S. 876 (1977) and *United Steelworkers of America v. Lorain, a Division of Koehring*

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[11] In *Eazor Express, Inc. v. International Brotherhood of Teamsters*, 520 F.2d 951, the Third Circuit held that implied in the no-strike provision of the applicable collective bargaining agreement was the obligation on the part of the International and Local unions to use their "best efforts" or "all reasonable means" at their disposal to end the wildcat activity of their members. In the event that the unions failed to use their "best efforts," the unions could be held liable for breach of contract under the principles of agency. The "best efforts" approach has been repudiated when "best efforts" was not contemplated by the parties while bargaining. *See Carbon Fuel Co. v. UMWA*, 582 F.2d 1346; *Airco Speer Carbon-Graphite v. Local 502, International Union of Electrical, Radio & Machine Workers of America*, 494 F. Supp. 872.

*Co.*, 616 F.2d 919 (1980), *cert. denied*, 451 U.S. 983 (1981), and the Ninth Circuit decision in *California Trucking Association v. Brotherhood of Teamsters*, 679 F.2d 1275.

Local 1702's attempted equation of "ratification" with "failure to use best efforts" fails because the premise of the argument is incorrect. The Local seems to be suggesting that it be absolved from liability for taking any action whatsoever to end the strike, even if the action was "foreseeably ineffective," thereby erasing the concept of ratification from common-law agency principles. A close reading of the opinion below reveals that the Fourth Circuit has not required that local union officials use their "best efforts" or "all reasonable means" to end the strike. Instead, the Fourth Circuit merely held that, in this particular factual context, the Local, by its foreseeably ineffective action, ratified and hence joined in the strike.

Local 1702 cites no case to support its position that the Fourth Circuit's finding of ratification is tantamount to requiring "best efforts" on the part of the Local officials. Perhaps this is so because case law from other circuits supports the Fourth Circuit's finding of ratification.

For example, the facts of the case at bar are practically "on all fours" with the facts of *United States Steel Corp. v. UMWA, District 20*, 598 F.2d 363, wherein the Fifth Circuit held that the local union was liable for breach of contract because its officers had ratified a wildcat strike. In *United States Steel*, the local president and several mine committeemen had gone into the bathhouse and told the first shift to go to work. Those orders were ineffective, and when the evening shift also failed to work, the local president called and publicized by radio a meeting of the local membership for the next morning. Following this meeting, the membership

remained on strike, and as a consequence, a second meeting was called for the second day. At the second meeting, "efforts" were again made to persuade the membership to cease the work stoppage with the same unsuccessful results as at the first meeting.

The Fifth Circuit in *United States Steel* held that the steps taken by the local officers were "foreseeably ineffective." [12] As in the instant case, the local membership meeting was not called at the earliest possible time. Further, the local officials made no attempt to reach the strikers by telephone, did not themselves work, and neither took nor threatened union disciplinary action against strike participants. Based upon those facts, the local officials' back-to-work directives were characterized as being "so lacking in authoritative forcefulness that they either were not heard at all . . . or were discounted as being merely stage lines parroted for the benefit of some later judicial review." 598 F.2d at 366. Furthermore, what force the directives may have had was belied by the union officials' failure to return to work. In conclusion, the Fifth Circuit stated that where a union's efforts to return to work are so minimal that the union's approval or encouragement may be inferred, the union itself ratifies the strike, and, as a matter of law, adopts the illegal activity as its own.

In addition, there is a decision out of the Third Circuit which is fully in accord with the decisions of the Fourth and Fifth Circuits. In *Airco Speer Carbon-Graphite v. Local 502, International Union of Electrical, Radio & Machine Workers of America*, 494 F. Supp. 872, the Third Circuit affirmed without opinion the district court's decision stressing the inaction of the local officials

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[12] Although *not* holding the local liable for damages "on the theory that any particular more effective tactic was left untried," the availability of stronger persuasive measures was considered "relevant to the critical question of the reasonableness of the steps which were taken." *United States Steel Corp.*, 598 F.2d at 366.

with respect to taking steps to persuade the members to return to work and holding the local liable for wildcat activity of its members upon a ratification theory.[13]

Moreover, Local 1702 misplaces reliance on the Sixth Circuit's decision in *United Steelworkers of America v. Lorain, a Division of Koehring Co.*, 616 F.2d 919, in its effort to create the impression of a "circuit conflict." In *Lorain*, the court did not find that the union officers had ratified the strike for not disciplining its members because, unlike the case at bar, no disciplinary procedures were available to the union during the strike. *See Airco Speer*, 494 F. Supp. at 878.

Thus, it is clear that the Fourth Circuit's ratification finding is not in conflict with decisions of other circuit courts. Furthermore, the Fourth Circuit's finding of ratification is amply supported by uncontested evidence adduced at trial. Thus, because the common-law agency theory of local union liability is entirely independent and separate from the mass action theory, irrespective of any perceived conflict among the circuits on the mass action issue, the Fourth Circuit's decision below should stand. It is simply unnecessary to address the mass action issue because the Fourth Circuit is so clearly correct in its resolution of the fact-oriented ratification issue.

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[13] For cases from other circuits stating that liability may be imposed on a local union for ratifying the wildcat activity of its members, *see, e.g., Davis Co. v. United Furniture Workers of America*, 674 F.2d 557; *Seattle Times Co. v. Seattle Mailer's Union No. 32*, 664 F.2d 1366 (9th Cir. 1982); *California Trucking Association v. Brotherhood of Teamsters, Local 70*, 679 F.2d 1275.

## CONCLUSION

For the reasons herein expressed, respondent Consolidation Coal Company respectfully requests the Court to deny the petition of Local 1702, United Mine Workers of America, for a writ of certiorari.

Respectfully submitted,

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